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In the Supreme Court of the United States

OCTOBER TERM, 1967

W. WILLARD WIRTZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HOTEL, MOTEL AND CLUB EMPLOYEES UNION, LOCAL 6

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	9
Argument:	
I. Respondent's rule requiring candidates for election to executive office to have had prior service in the union's legislative body is not a "reasonable qualification uniformly imposed"	12
A. Respondent's rule is unreasonable when measured against prevailing concepts of democracy in public and union elections	16
B. Respondent's rule is not used to limit executive office to those experienced in union affairs	18
C. Respondent's rule allows the incumbents to maintain control and to stifle dissent	21
II. Respondent's rule "may have affected the outcome" of the challenged election	24
III. In a suit filed under Section 402 of the Act to set aside a union election, the Secretary may include in his complaint all violations discovered in his investigation and brought to the attention of the union, without regard to whether such violations were included in the protest of the complaining union member to the Secretary	30
Conclusion	35
Appendix	37

293-613—68——1

CITATIONS

Cases: Page

Calhoon v. *Harvey*, 379 U.S. 134 15

Goldberg v. *Amarillo General Drivers, etc., Local Union No. 577*, 214 F. Supp. 74 ..... 15, 17

Wirtz v. *Local 30, International Union of Operating Engineers*, 242 F. Supp. 631, vacated on other grounds, 366 F. 2d 438 ..... 16, 17

Wirtz v. *Local Union No. 125, Laborers' International Union of North America*, No. 58, decided January 15, 1968 ..... 12, 31, 32, 33

Wirtz v. *Local 153, Glass Bottle Blowers Association*, No. 57, this Term decided January 15, 1968 15

Wirtz v. *Local 406, etc., International Union of Operating Engineers*, 254 F. Supp. 962 ..... 17, 28

Wirtz v. *Local Unions 410, etc.*, 366 F. 2d 438 27

Statutes:

Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq* 2, 24, 25

Section 2(a), 29 U.S.C. 401(a) 37

Section 2(b), 29 U.S.C. 401(b) 13, 37

Section 2(c), 29 U.S.C. 401(c) 38

Section 401(a), 29 U.S.C. 481(a) 38

Section 401(b), 29 U.S.C. 481(b) 38

Section 401(c), 29 U.S.C. 481(c) 38

Section 401(d), 29 U.S.C. 481(d) 39

Section 401(e), 29 U.S.C. 481(e) 2, 7, 10, 14, 40

Section 401(f), 29 U.S.C. 481(f) 40

Section 401(g), 29 U.S.C. 481(g) 40

Section 401(h), 29 U.S.C. 481(h) 40

Section 401(i), 29 U.S.C. 481(i) 40

Section 402, 29 U.S.C. 482 30

Section 402(a), 29 U.S.C. 482(a) 6, 41

Section 402(b), 29 U.S.C. 482(b) 7, 31, 42

Section 402(c), 29 U.S.C. 482(c) 8, 24, 42

Section 402(c)(2), 29 U.S.C. 482(c)(2) 26

Section 402(d), 29 U.S.C. 482(d) 43

Section 403, 29 U.S.C. 483 43

Section 601, 29 U.S.C. 521 43

Miscellaneous:

	Page
105 Cong. Rec. 885	14
105 Cong. Rec. 14273	14
105 Cong. Rec. 15887	25
105 Cong. Rec. 16150	25
105 Cong. Rec. 19765	25
H. Conf. Rep. No. 1147, 86th Cong., 1st Sess	25
H. Rep. No. 741, 86th Cong., 1st Sess	13
Interim Report of the Select Committee on Improper Activities in the Labor Management Field, S. Rep. No. 1417, 85th Cong., 2d Sess	13, 15
Leiserson, *American Trade Union Democracy* (1959)	24
S. Rep. No. 187, 86th Cong., 1st Sess	13, 14, 17, 32
S. 505, 86th Cong., 1st Sess., 105 Cong. Rec. 892	25
S. 1002, 86th Cong., 1st Sess., 105 Cong. Rec. 2067	32
Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221 (1961)	23
Taft, *The Structure and Government of Labor Unions* (1954)	24

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OPINIONS BELOW

The opinion of the court of appeals (A. 314) is reported at 381 F. 2d 500. The opinion of the district court (A. 288) is reported at 265 F. Supp. 510; an earlier opinion of that court striking portions of the complaint (A. 18) is unreported.

JURISDICTION

The decision of the court of appeals (A. 314) was rendered on July 28, 1967. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on September 20, 1967 (A. 329, 330). Final judgment (A. 327–328) was entered on September 22,

1967. The petition for writ of certiorari was filed on December 6, 1967, and granted on January 29, 1968 (A. 331). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a union rule severely restricting the eligibility of members to become candidates for executive office—here a requirement of prior service in the union's legislative body—may be deemed a "reasonable qualification" under Section 401(e) of the Labor-Management Reporting and Disclosure Act of 1959, notwithstanding the unusual character of the rule and the finding that it effectively eliminates dissident candidates.

2. Whether a candidacy qualification "may have affected" the outcome of a union election within the meaning of Section 402(c) of the Act when it resulted in the disqualification of several nominees for union office and rendered approximately 93 percent of the membership ineligible to run for office.

3. Whether, when a union member complains to the Secretary of Labor, the latter may allege in a subsequent court action violations which are disclosed by his investigation of the union election complained of, which were not charged in the union member's protest to the union or complaint to the Secretary, but of which the union had fair notice before suit.

STATUTE INVOLVED

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*, are printed in the Appendix, *infra*, pp. 35-42.

STATEMENT

I

Respondent represents some 27,000 bartenders, maids, and dining-room and kitchen help employed in hotels, motels, and private clubs in New York City (A. 290, 291, 296).[1] The union has seven districts—one covering private clubs and six geographic districts for hotel and motel employees. The latter group is further divided into five craft departments within each geographic district: for housekeeping, kitchen, dining-room, banquet, and bar workers. Within each hotel, motel, and club, there are several shops—such as the dining-room or kitchen—where the members of a particular craft work. (A. 291.)

The government of the union is four-tiered, and is composed of some elected and some appointed officials. At the top are four general officers, elected by the membership: president, secretary-treasurer, general organizer, and recording secretary (A. 292). They, together with seven vice presidents—one elected from each of seven districts—and delegates to the New York Hotel and Motel Trades Council, who are appointed but may also hold elective positions, comprise the second tier—the "Administrative Board." (A. 84, 202, 292.)

The third tier, the Executive Board, besides the membership of the Administrative Board, includes one delegate for each 500 union members, whom the fourth tier—the Assembly—elects from among its own membership. Business agents sit with the Executive Board,

[1] The union also represents telephone operators and elevator operators in private clubs (A. 52).

but may not vote. Thirty-one business agents are elected by the members of the seven districts[2] but the Assembly may appoint as many more as it wishes. (A. 202, 203, 292.)

The Assembly is composed of the members of the Administrative Board, the business agents, and delegates elected from the craft units within each district at the rate of one delegate for each 75 members.[3] A vacancy in any office may be filled by appointment of the general officers, subject to approval by the Executive Board and the Assembly. (A. 203, 204, 293.)

The bylaw here in issue has, since 1951, required that a union member to "'be eligible for nomination as" a general officer, district vice-president, or business agent—the full-time, paid positions—"must be a member of either the Assembly or the Executive Board, or else, at some time in the past, have served at least one term on either the Executive Board, the Assembly or the old Shop Delegates Council," which was the legislative body of the union prior to 1951.[4] The bylaw applies only to candidates for election to office and not to those appointed to office. (A. 290, 293.)

Although the bylaws establish the Assembly as the union's highest governing body (A. 209), in actual practice the body merely approves reports and policies of the officers and the Executive Board; respondent's

[2] Each district elects 1, 3, or 4 agents (A. 227, 229, 231, 232–233, 235, 237, 238).

[3] However, the number that may be elected from any hotel is limited (A. 292).

[4] The bylaw also requires that a candidate have been a member of the union in good standing for two years prior to the election (A. 293), a rule that the Secretary has not challenged in this case.

president could not recall the Assembly's disapproving any action of the Executive Board in recent years (A. 57–58). The Assembly usually meets, with poor attendance, only four times a year, thrice for a few hours, while the fourth meeting lasts one day (A. 208, 243–244).

Between meetings of the Assembly, governing power is exercised by the Executive Board. Between the monthly meetings of the Executive Board, power is exercised by the Administrative Board. (A. 209.)

About 120 of the 400-odd members of the Assembly play an active role in union affairs through service on committees which formulate wage demands and informally consider union problems between the quarterly Assembly meetings (A. 86–87).

Each member of the Assembly belongs to a council in the district he represents. These councils are forums for internal union discussions rather than organs of actual union government or administration (A. 85). Each shop has a steward of its own election who also belongs to the district councils, but does not thereby become eligible to run for union office (A. 291–292, 51–52, 55, 305).

II

Between 1951 and 1965, respondent held five elections. Each was won by the so-called "Administration Party," whose slates were composed largely of incumbents. There was never more than a smattering of opposition, and no opposition candidate was successful (A. 293–296).

dates," 105 Cong. Rec. 885, because otherwise "practical control of elections is left in the hands of autocratic union officials," 105 Cong. Rec. 14273. Section 401(e), 29 U.S.C. 481(e), thus establishes the right of every union member in good standing to be a candidate for any office "subject * * * to reasonable qualifications uniformly imposed."

The Act offers no specific guide for determining what are "reasonable qualifications". However, Congress, in its numerous references to the need for democratic processes, may be assumed to have taken as its model elections generally conducted in the United States. As one of the Committee Reports observes, unions and their members "aspire to live by the same basic principles and values within their group as they hold ideal for the whole community." S. Rep. No. 187, 86th Cong., 1st Sess., pp. 5–6.

Certainly Congress recognized that an essential attribute of democratic election is freedom to choose, and that restrictions on nominations substantially inhibit the potential breadth of choice. This case does not call for a precise measurement of the scope of the choice required. The prior office-holding requirement involved here—unlike a requirement related to age, length of membership in the union, or absence of a criminal record—is bound to disqualify the vast majority of the membership of any union. Nothing in the election processes of any democratic society imposes so drastic a prior restraint on a voter's freedom of choice. Such a curtailment simply cannot be squared

with the clearly expressed premise of Title IV: the need of "assuring democratic processes in labor unions" and achieving a "revitalization of the democratic processes of labor unions." Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1417, 85th Cong., 2d Sess., p. 452.

The Secretary of Labor, to whose "special knowledge and discretion" the enforcement of Title IV is entrusted, *Wirtz* v. *Local 153, Glass Bottle Blowers Association,* No. 57, this Term, decided January 15, 1968, slip op., p. 10; *Calhoon* v. *Harvey,* 379 U.S. 134, 140, has not, however, gone so far as to contend that any prior office-holding requirement would be unreasonable. It is enough to suggest that such a candidacy qualification must be scrutinized with great care, and that the burden is on the proponents of the rule to justify it.

The Secretary has developed and, until the decision in this case, the courts have generally accepted, several criteria for measuring the legitimate needs of the union against the effect of a candidacy requirement upon the freedom of choice of union members. The first step is to determine whether the union has some realistic need for the requirement. No restriction on freedom of choice can be even arguably "reasonable" unless it is designed to limit candidacy in a manner that clearly and directly achieves some "legitimate needs or necessities of the * * * union", *Goldberg* v. *Amarillo General Drivers, etc., Local*

In the May 1965 election, the Administration Party for the first time in 14 years faced organized opposition. A group that called itself the "Membership Party" nominated candidates for the four general offices, for ten positions of delegate to the international convention of the union, for 13 of the 27 vice-president and business-agent positions, and for five of 372 Assembly spots (A. 298). One of the four nominees for general office—the nominee for secretary-treasurer—and 7 of those for district office were ruled ineligible for failure to satisfy the prior office-holding requirement (A. 299). The Membership Party then ran candidates for only four executive offices—president, general organizer and business agent in two districts—while the administration ran a full slate (A. 298).[5] 11,254—or about 40 percent of the eligible union members—voted in the election. Where administration candidates were opposed, they won by margins of approximately 7 to 1. (A. 301–302.)

III

After the election, members of the Membership Party invoked internal union remedies in protest of the prior office-holding qualification (A. 289). When this course proved unsuccessful, they filed an appropriate complaint with the Secretary of Labor pursuant to Section 402(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(a). The Secretary, after investigation, brought this action pur-

[5] The other nominees of the Membership Party were disqualified for failure to have been members in good standing for two years prior to the election (A. 299). See note 4, *supra*.

suant to Section 402(b) of the Act, 29 U.S.C. 482(b), asking the district court to set aside the union's May 1965 election and to direct a supervised election. The Secretary alleged that respondent's prior office-holding requirement violated Section 401(e) of the Act, which provides that every member in good standing shall be eligible to be a candidate for and hold office, subject only to "reasonable qualifications uniformly imposed" (A. 4–5).

The Secretary also asserted three other violations of the Act: failure to give adequate and timely notice of the composition of election districts, improper interference with the members' right to vote for and support candidates, and the use of appointment rather than election to fill certain union offices (A. 5). The district court, however, struck the latter allegations on the ground that the Membership Party had not protested such matters in the internal complaint which triggered the proceeding (A. 19–22).

After trial, the district court held that the rule restricting candidacy to prior members of the Assembly was not reasonable. It rejected the union's claim that the complexity of its problems required its officers to have a minimum of experience in union affairs, pointing out that "the premise [is] that the membership at large cannot be trusted properly to evaluate union experience in casting election ballots. The philosophy of a free democratic society, expressed in the Act, does not tolerate such a premise" (A. 305).

The prior office-holding requirement was thought unreasonable, both because it rendered 93 percent of

the membership ineligible and because a former member of the Shop Delegates Council, who may not have held office for 14 years, could qualify as a candidate while a currently serving shop steward could not (A. 305).

The court further found that the effect of the rule was to curtail opposition, because in practice only candidates on the administration ticket could be elected to the Assembly (A. 305–306). Because a member could be appointed to fill a vacancy without satisfying the prior office-holding requirement, the court concluded "once such an officer is appointed, he automatically becomes a member of the Assembly and immediately becomes eligible to run thereafter for any union office. This enables the incumbent group to qualify members for elective office by a procedure not available to dissidents" (A. 306).

The district court refused, however, to order a new election under the supervision of the Secretary, on the ground that it could not find that the prior office-holding requirement "may have affected the outcome" of respondent's 1965 election within the meaning of Section 402(c) of the Act, 29 U.S.C. 482(c) (A. 306). Although application of the requirement caused the disqualification of nine candidates, the court noted that there was, nevertheless, a contested election, with Membership Party candidates running for president and nine other offices (A. 307). Since all ten opposition candidates were defeated by margins of 7 to 1 or better, the court concluded that the presence of the

disqualified nominees on the ballot could not have changed the results (A. 307).

The court of appeals affirmed, but on different grounds. The majority found the prior office-holding requirement lawful, commenting: "It does not seem to us to be surprising that the union should hesitate to permit a cook or a waiter or a dishwasher without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union" (A. 320). One judge concurred in the result, expressing his agreement with the district court's opinion that the effect of the rule in curtailing opposition established the unreasonableness of the requirement. But he accepted the district court's refusal to find that the outcome of the election might have been affected thereby (A. 323–325).

All three judges agreed that the district court had properly refused to hear the issues tendered by the allegations of additional violations. The ground, however, was that no member of the union had filed with the Secretary a complaint addressed to the additional violations specified in the Secretary's suit, and that the Secretary, whose only function is to act as the "union member's lawyer," may only litigate points so raised by a union member (A. 322).

SUMMARY OF ARGUMENT

I

Among the provisions of Title IV of the Labor-Management Reporting and Disclosure Act—whose

central goal is to guarantee such "free and democratic" processes as are necessary "to insure that the officials who wield [union power] are responsive to the desires of the men and women whom they represent", S. Rep. 187, 86th Cong., 1st Sess., p. 20—is a requirement that every union member in good standing be allowed to run for any office "subject * * * to reasonable qualifications uniformly imposed" (Section 401(e)).

Congress surely intended that union electorates have the same broad potential choice in selecting their leaders as is generally available in the electoral process. It may well be that any prior office-holding requirement is too drastic a prior restraint on a voter's freedom of choice. At all events, however, the challenged requirement is plainly unreasonable when judged by the criteria that the Secretary has developed—and the courts until this case have accepted.

Thus such a restriction is virtually unprecedented among labor unions of comparable size. What is more, the rule does not even serve the function of limiting office to those with pertinent prior experience. For example, the requirement did not control appointments to union office, although appointees hold a significant number of responsible positions. And the record shows that service in the Assembly of itself gives little experience in the management of union affairs. Moreover, such experience as Assembly members gain in union affairs is equally available to shop stewards who are not eligible to run for office.

Further, as the district court found, the effect of the prior office-holding requirement is to allow the incumbent Administration Party to maintain control

of the union, and substantially to restrict eligibility for office in a manner that assures continuation of this control; dissident groups must be formed by a "palace revolt," for they cannot qualify for executive office except by the Administration Party previously having nominated them for the Assembly.

II

Once a violation of Title IV is established, the district court is to direct a new election under the supervision of the Secretary of Labor if the unlawful procedure "may have affected the outcome" of a union election. The phrase "may have affected" was deliberately chosen to relieve the Secretary of the burden of showing that a violation actually did affect the result.

Although there may be violations—such as the failure to count certain ballots—that may be shown with certainty not to have affected the outcome, any requirement such as the present one, with results that cannot be defined or measured with certainty, surely "may have affected" the result. Here, where the rule barred some 93 percent of union members from candidacy and disqualified announced candidates, it is particularly clear that the restriction may have changed the result. The overwhelming defeat of the few qualified opponents to the Administration Party nominees does not prove the contrary: with more

available candidates to choose from, the opposition group could have fielded a more complete slate and waged a more effective campaign. These factors alone should require a new election under the Secretary's supervision.

III

If the Court rejects either of our first two arguments, it becomes necessary to consider whether the courts below were correct in holding that the Secretary may not seek a new, supervised election on the basis of violations discovered through the Secretary's own investigation, but which were not encompassed within the union members' complaint to him.

In light of the broad investigative powers that the Act confers on the Secretary, and the Secretary's role in protecting the public interest, we submit that the ruling below should be reversed insofar as it bars the allegation of violations that respondent "had a fair opportunity to consider and resolve" before the Secretary brought suit. *Wirtz* v. *Local Union No. 125, Laborers' International Union of North America*, No. 58, this Term, decided January 15, 1968.

ARGUMENT

I. RESPONDENT'S RULE REQUIRING CANDIDATES FOR ELECTION TO EXECUTIVE OFFICE TO HAVE HAD PRIOR SERVICE IN THE UNION'S LEGISLATIVE BODY IS NOT A "REASONABLE QUALIFICATION UNIFORMLY IMPOSED"

In recommending passage of Title IV of the Labor Management Reporting and Disclosure Act, the responsible Senate committee concluded that the quasi-

governmental powers of unions should require unions to follow such "free and democratic" processes as are necessary "to insure that the officials who wield [this power] are responsive to the desires of the men and women whom they represent." S. Rep. No. 187, 86th Cong., 1st Sess., at p. 20; see, also, H. Rep. No. 741, 86th Cong., 1st Sess., at p. 16. Because its investigation revealed a general "disregard of the rights of individual employees," 29 U.S.C. 401(b), including "a significant lack of democratic procedures," S. 1417, 85th Cong., 2d Sess., p. 4, Congress drafted Title IV to assure "the maintenance of minimum democratic safeguards," S. Rep. No. 187, *supra,* at p. 7.

That Title covers all aspects of election procedure, and contains provisions designed to guarantee fairness and democracy from beginning to end. Unions must hold international elections at least once every five years and local elections at least every three years. During election campaigns unions must provide candidates with membership lists and equal treatment in mailing campaign literature. A secret ballot is mandatory, and all candidates may have observers at the polls and at the counting of ballots.

This case is concerned with the portion of the statute that deals with the nomination of candidates for office. Because it is the very start of the election process, any substantial deviation from democratic methods of nomination tends to defeat the goal of union government responsive to the will of its members. Congress therefore recognized that there must be a "real opportunity to nominate opposing candi-

Union No. 577, 214 F. Supp. 74, 80 (N.D. Tex.), "which cannot be otherwise satisfied without resort to this procedure," *Wirtz* v. *Local 30, International Union of Operating Engineers,* 242 F. Supp, 631, 634 (S.D.N.Y.), vacated on other grounds, 366 F. 2d 438 (C.A. 2).

The legitimacy of the need asserted and the narrowness of the means used to achieve it must of course be subjected to several measures: How does the union's approach compare with the general conduct of public elections in the United States? And how does it compare to the usages of other unions? May the restriction on candidacy reasonably be expected to achieve the need asserted in justification?

But even a demonstration of need, sought through as narrow as possible a restriction, should not be enough to pass muster. For a restriction cannot be "reasonable" if it may be expected to restrain nominations to such an extent as to facilitate the in-group's attempt to suppress and avoid competition at the polls. We suggest that respondent's prior office-holding requirement fails on all these counts.

A. RESPONDENT'S RULE IS UNREASONABLE WHEN MEASURED AGAINST PREVAILING CONCEPTS OF DEMOCRACY IN PUBLIC AND UNION ELECTIONS

Respondent's asserted need for a prior office-holding rule was to limit candidacy to members experienced in union affairs. It is no doubt desirable for union affairs to be managed by those who are experienced and knowledgeable. Perhaps the Second Circuit majority was correct in its assertion that "[i]t does not seem to us to be surprising that the union

should hesitate to permit a cook or a waiter or a dishwasher without any training or experience in the management of union affairs to take on responsibility for the complex and difficult problems of administration of this union" (A. 320). But the essence of democracy is in the procedures used to accomplish its aims. Every society and every free electorate seeks an administration of competency, in which experience is an essential ingredient. But it has not been the scheme of democracy in this country to assure competence by requiring prior public service on the part of candidates. The idea has instead been to place trust in the common sense and judgment of an informed electorate.

Congress plainly intended that the same factor govern in the conduct of union elections. Thus the Senate Committee said, "Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs." See S. Rep. No. 187, *supra*, p. 7.

This view is reinforced by the criteria other unions have established. The record in this case includes an exhaustive study of the relevant practices of the labor "community." See *Goldberg* v. *Amarillo General Drivers, etc., Local Union No. 577, supra; Wirtz* v. *Local 30, International Union of Operating Engineers, supra; Wirtz* v. *Local 406, International Union of Operating Engineers,* 254 F. Supp. 962 (E.D. La.). The evidence showed that only one of 72 national and international unions whose membership exceeds 40,000 imposes any such prior office-holding require-

ment upon candidates for local union office (A. 162–163, 268–269). And that one exception—the International Lady Garment Workers Union—provides the alternative of a union-offered course of study in union management (A. 163, 269).

The evidence further showed that of 23 unions having membership between 20,000 and 40,000, not one imposed such a requirement, even upon candidates for national office (A. 157–158, 258–259). And the result is not essentially different, if the unions are analyzed according to their financial receipts rather than the number of their members—of the 66 local unions reporting receipts of over $1,000,000 in 1964, only 7 had a prior office-holding qualification, and the 6 in addition to respondent were members of the ILGWU (A. 160, 161–162, 260–265). Respondent's prior office-holding requirement is not even the norm within its own trade. Only 32 of the 125 largest locals—those with over 900 members—affiliated with the same international have any such requirement (A. 153–155, 250–257).

B. RESPONDENT'S RULE IS NOT USED TO LIMIT EXECUTIVE OFFICE TO THOSE EXPERIENCED IN UNION AFFAIRS

Even if it were conceded that the general tests established in a union's bylaws, rather than the judgment of the members themselves, should determine who is sufficiently experienced to hold union office, respondent's prior office-holding qualification does not serve such a purpose. The bylaw requires prior service in either the Assembly or the old Shop Delegates Council. Two-thirds of the persons who were eligible to run for office under this test had attained that

status through service on the old Shop Delegates Council, a body that had not existed since 1951 (A. 297).

Moreover, any member of the union—whether or not he satisfied the prior office-holding requirement—could be appointed to any union office (A. 293). Notably, the delegates to the New York Hotel and Motel Trades Council, who are members of the Administrative Board (A. 84)—the group that exercises union power on a day-to-day basis—are appointed and are not subject to the prior office-holding rule. Thus respondent itself has decided that prior office-holding is not an essential for persons who sit on its second most powerful tier. How then can such a requirement be justified for the others who serve at the same or a lower level?

Moreover, the record strongly suggests that membership in the Assembly, in and of itself, gives little experience in the conduct of union affairs. The group meets only four times a year (A. 204), and in practice routinely approves the reports of the union officers (A. 57–58, 208–209, 244). The union has attempted to enhance the value of such service by claiming that Assembly members serve on committees that meet more often (A. 82–87). But the record shows that less than a third of the 400 members regularly served on such committees (A. 87).

The only groups in which all members of the Assembly participate are councils in each district, which meet for the purpose of questioning union officers and generally discussing union activities; they have no

governing function (A. 55–56, 86). Only here would the average Assembly member gain to a significant extent the "opportunity for meeting with officers and with other more experienced members for discussion and consideration of contract negotiations, enforcement of contract clauses, union finances and many other aspects of union administration" which the Second Circuit majority thought was the saving benefit of Assembly service (A. 320).

The union's shop stewards, however, also participate in these district councils but are not eligible to run for office (A. 51–52, 55). They are extremely active in union affiairs; they are responsible for prosecuting grievances of members, and participate in the distribution of the workload among members in the shop. They attend meetings of their shop, their craft members, and their district (A. 50–51, 52–56, 121–122, 141–143). Such a person gains at least as much experience as the average Assembly member who becomes eligible to run for office. Yet, even though the Membership Party nominee for vice president in the May 1965 election, for example, was a shop steward with such a background, he was disqualified because he had not also been a member of the Assembly (A. 121–122, 124, 125–126).

It is doubtful, then, that respondent's prior office-holding requirement guarantees experience in those who administer its affairs, or is thought necessary for this purpose. But even if the requirement could be so viewed, the failure to apply it in the case of all members of the union's Administrative Board, and

its use to exclude shop stewards from candidacy, demonstrate that is not "uniformly imposed" as the statute requires.

C. RESPONDENT'S RULE ALLOWS THE INCUMBENTS TO MAINTAIN CONTROL AND TO STIFLE DISSENT

It is equally clear that the requirement provides a facile method for the Administration Party to maintain control of the union. There are few restrictions on candidacy that could have a broader exclusionary effect than the one in this case. It rendered ineligible for executive office about 93 percent of respondent's members. Even assuming that an entirely new Assembly were elected every three years, it would take over 20 years for as many as an additional 10 percent of the members to become eligible. In fact, however, eligibility has not expanded even to this extent. Thus the evidence showed that in this union only 543 members had gained eligibility for office during the 14-year period between 1951 and 1965 (A. 305).

Of course, numbers by themselves prove little; the same statistics demonstrate that there are 60 eligibles for every union executive office. But the realities are that opposition in a union inevitably finds that many members do not support it, and many members who do support it would not wish to run for office as opposition candidates. This is particularly so here, since all who are eligible to oppose have qualified through their association with the Administration Party.

Moreover, many who might wish to run for office on the opposition ticket may simply be unsuitable candi-

dates because of age, health, personality, or a variety of other reasons. Thus, among the pool of theoretically qualified candidates, only a small number are likely to be available to an opposition party, even where there is a broad restriction on candidacy. This small number may well shrink to a practical nullity when the pool of theoretically available candidates has already been shrunk by a restrictive candidacy qualification to less than 7 percent of the union membership.

In this case these are not mere potentialities. The district court found, and the court of appeals did not dispute, that:

> In practice it was not possible to be elected to the Assembly except with the blessing of the Administration Party conferred by selection to run for the Assembly on Row A. This was doubtless in large part because there was never a full slate of opposing candidates for the Assembly. The candidates to run on Row A for the Assembly were selected by the incumbent group of officers and were put in nomination after caucuses of invited members, attended by officers. It was only natural that candidates selected to run on Row A for the Assembly would be supporters of the administration. All candidates on Row A were pledged to support each other. Dissidents could not be elected to the Assembly. (A. 297.)

Thus a dissident group did not even have the opportunity of attempting to capture the Administra-

tion Party nominations, since they would be excluded from the Administration Party caucus (A. 122–123). In effect, the union's rule resulted in a situation that could be changed only by a "palace revolt." [6]

The court of appeals apparently assumed that a dissident group with wide support in the union could attain power in two stages—first by electing candidates to the Assembly, and then by running these candidates for union office at the next election. The imposition of such a procedure is surely inconsistent with prevailing concepts of fair and democratic procedure. Would it be considered consistent with those concepts if, for example, a State imposed on would-be gubernatorial candidates the condition of having belonged to the State legislature at some time, however distant, in the past? Or, what is the more accurate analogy, if a new party could not run a candidate for governor or other State executive post unless it had controlled the State legislature for the prior three years?

Moreover, the effect of respondent's prior office-holding rules, in combination with the union's rule requiring one year of membership in good standing for Assembly candidacy (A. 210), means that a new member must wait at least four years to run for principal office in the union, and this period can reach almost

[6] See Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1225 (1961): "Requiring candidates for top office to have served previously on the executive board seriously handicaps an opposition group in replacing the incumbents unless it can inspire a 'palace revolt'."

seven years if the prospective candidate happens to enter eleven months before a triennial election.[7]

The court of appeals' approach would have a particularly severe effect in stifling dissent. In most unions, there is no organized opposition party which retains its identity from election to election; typically, an opposition group will form in response to a specific issue and will organize and exist only during a particular election.[8] Yet, if an opposition group with wide support may obtain power only by first electing its members to the Assembly, and then running these members for union office at the next election, that opposition must either anticipate the issues by at least three years, or must form its slate from former members of the Administration Party.

We submit that no rule with this and the other untoward results we have described here can possibly be a "reasonable qualification uniformly imposed."

II

RESPONDENT'S RULE "MAY HAVE AFFECTED THE OUTCOME" OF THE CHALLENGED ELECTION

The remedies of Title IV come into play whenever a procedure unlawful under Section 401 "may have affected the outcome" of a union election. Section 402

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[7] Because of the high turnover in union membership—about 10 percent annually (A. 297)—another effect is that a substantial percentage of union members can never become eligible for office.

[8] Taft, *The Structure and Government of Labor Unions* (1954) at 35–37, 52; Leiserson, *American Trade Union Democracy* (1959) at 74–75.

(c), 29 U.S.C. 482(c). Congress deliberately chose the phrase "may have affected" to relieve the Secretary of the burden of showing that a violation actually did affect the result. The bill passed by the Senate (S. 1555) contained the "may have affected" language. 105 Cong. Rec. 16150. The bill passed by the House (H.R. 8342), as well as the Kennedy-Ervin bill as originally introduced in the Senate (S. 505, 86th Cong., 1st Sess., 105 Cong. Rec. 892), required a showing that the violation had "affected" the outcome. 105 Cong. Rec. 15887. Faced with a choice between these formulations, the Conference Committee adopted the "may have affected" language. H. Conf. Rep. No. 1147, 86th Cong., 1st Sess., pp. 33–35. Senator Goldwater explained (105 Cong. Rec. 19765):

> The Kennedy-Ervin bill (S. 505), as introduced, authorized the court to declare an election void only if the violation of section 401 actually affected the outcome of the election rather than may have affected such outcome. The difficulty of proving such an actuality would be so great as to render the professed remedy practically worthless. Minority members in committee secured an amendment correcting this glaring defect and the amendment is contained in the conference report.

The purpose, then, was to ensure that once use of an improper election procedure was established, the Secretary would not be burdened with an impractical burden of proof as a prerequisite to a new untainted election. There will no doubt be cases where the proof will show with certainty that the unlawful procedure

could not have affected the outcome—as, for example, when the defect lies only in a refusal to tabulate certain ballots, and the number of uncounted votes is plainly less than the successful candidate's margin of victory. But the more usual circumstance will be like this case—where a procedure unlawful under Section 401 has limited to an unknown extent the number of candidates or voters, or the ability of a candidate to communicate with voters, or the freedom with which voters are allowed to cast ballots. In these instances, the effect of the violation cannot be accurately measured. No one can reasonably predict what the outcome of the election would have been if there had been total compliance with the Act. It might have been the same; it might have been different in whole or in part.

These uncertainties must be what Congress had in mind when it chose the present formulation of Section 402(c)(2). The precise effect of the tainted procedure depends on speculative factors. Congress did not want a suit for relief from an improper union election to fail for want of proof of such imponderables.

Certainly, as a matter of logic alone, the exclusion of a single candidate "may have affected the outcome" of any election. No one can ever know, one way or the other. Therefore, we submit, because respondent's prior office-holding rule resulted in the disqualification of several candidates, it assuredly "may have affected the outcome" of the May 1965 election.

In short, we think the Second Circuit ruled correctly in *Wirtz* v. *Local Unions 410, etc.*, 366 F. 2d 438, 443, that *any* exclusion of willing candidates from the ballot meets the statutory test:

> The proviso was intended to free unions from the disruptive effect of a voided election unless there is a meaningful relation between a violation of the Act and results of a particular election. For example, if the Secretary's investigation revealed that 20 percent of the votes in an election had been tampered with, but that all officers had won by an 8–1 margin, the proviso should prevent upsetting the election. Compare *Wirtz* v. *Local 11, International Hod Carriers, etc.*, 211 F. Supp. 408 (W.D. Pa. 1962). But in the cases at bar, the alleged violations caused the exclusion of willing candidates from the ballots. In such circumstances, there can be no tangible evidence available of the effect of this exclusion on the election; whether the outcome would have been different depends upon whether the suppressed candidates were potent vote-getters, whether more union members would have voted had candidates not been suppressed, and so forth. Since any proof relating to effect on outcome must necessarily be speculative, we do not think Congress meant to place as stringent a burden on the Secretary as the district courts imposed here.

But the Court need not go so far to resolve the present controversy, for the record does not support the district court's conclusion that "the heavy vote in favor of the administration candidates is convincing that the existence and enforcement of the by-laws

could not have affected the outcome of the election" (265 F. Supp. at 521).

In the first place, the bylaw rendered ineligible to run for office over 93% of the union's membership. There is simply no way of knowing whether other candidates from the 93% who were excluded might have come forward and won a union office, but certainly this could well have occurred. As the district court in *Wirtz* v. *Local Unions 406, etc., International Union of Operating Engineers,* 254 F. Supp. 962, 966–967 (E.D. La.) stated:

> Where restrictions on candidacy reasonably deprive the substantial majority of the membership of the right to be candidates for union office, there is little question that they "may have affected the outcome" of the election. The word "may" indicates the necessity only for the showing of a reasonable possibility that the violation would affect the outcome.

This is all the more so here, where the record shows the effect of the bylaw was to suppress dissent within the union. It is true, as the district court noted, that only five opposition candidates, including only two from the Membership Party, contended for the 372 seats in the Assembly, and that the lack of a full slate made votes for the opposition less likely. But the absence of a contested election for most offices was itself a reflection of a climate in which opposition was discouraged—a climate evidenced by the prior office-holding rule.

In addition, the exclusion of 9 Membership Party candidates from the ballot surely tended to lessen the

effectiveness of the opposition. The district court asserted that there was nevertheless a contested election at which the Membership Party ran candidates who met with crushing defeat, and the presence of the disqualified nominees on the ballot would not have changed the result, since there was no "dramatic or important issue to rouse the membership against the incumbents" (A. 308). Such speculation involved the court in assessing the strength of the issues on which the opposition party was running, and assessing the political attractiveness of the candidates who were excluded from the ballot. Such hindsight assessments are difficult enough when made in connection with national political campaigns; it is certainly much more difficult for a judge without day-to-day familiarity with the affairs of a union to make this sort of judgment for a union political campaign.

Moreover, additional candidates, simply by their numbers, would have increased the ability of the opposition to communicate its platform[9] and its overall views to the members. And no court can ignore the possibility that some excluded candidate could have raised issues in addition to those that in fact were debated.

We conclude that the district court was unwarranted in speculating that the challenged rule did not affect the outcome of the union election. In our view, the court went beyond its proper role in attempting to weigh probabilities. On this record, it

[9] The Membership Party put forth a platform containing 16 points (A. 278–279).

is plain that the prior office-holding requirement "may" have changed the result. The statute requires no more.

III

IN A SUIT FILED UNDER SECTION 402 OF THE ACT TO SET ASIDE A UNION ELECTION, THE SECRETARY MAY INCLUDE IN HIS COMPLAINT ALL VIOLATIONS DISCOVERED IN HIS INVESTIGATION AND BROUGHT TO THE ATTENTION OF THE UNION, WITHOUT REGARD TO WHETHER SUCH VIOLATIONS WERE INCLUDED IN THE PROTEST OF THE COMPLAINING UNION MEMBER TO THE SECRETARY

The Secretary's complaint included three matters that he had discovered in his investigation before filing suit but which the union members had not protested internally or to him. These alleged violations of the Act were:

(1) the failure to give timely notice of the geographic boundaries of Assembly districts;

(2) improper interference with the right to support and vote for candidates; and

(3) the appointment, rather than election, of certain executive officers.

Because they were new charges, initiated by the Secretary of Labor, the courts below held they could not be considered.

Our challenge to that ruling need not be reached if the Court agrees with our contention that respondent's prior office-holding requirement is an unlawful rule that may have affected the outcome of the 1965 election. In that event, a supervised election will be directed, at which the Secretary will be able to guard against any repetition of the first two violations. And

the issue with respect to appointment of officers is eliminated for the future, we are advised, by a change in respondent's bylaws. On the other hand, should the Court reject either of our arguments on the prior office-holding requirement, it would become necessary to decide whether these additional charges should have been considered below.

In *Wirtz* v. *Local Union No. 125, Laborers' International Union of North America, supra,* this Court held that the Secretary is entitled to include in a Title IV complaint any matter as to which the union had "fair notice" through the union member's internal complaint preceding the suit. However, the Court refrained from deciding whether the Secretary could challenge a violation discovered in his investigation but not raised in the member's complaint. We contend that the rationale of the decision in the *Local 125* case requires the same result here, at least to the extent that the Secretary can prove that the union had the same opportunities for self-correction that would have followed from an internal union proceeding.

The language of the statute does not require that the Secretary's suit challenge only the particular violation specified in the union member's internal complaint; the Secretary is empowered to bring suit if, after investigating the complaint, "he finds probable cause to believe that *a violation of this subchapter* has occurred." 29 U.S.C. 482(b). (Emphasis added.) This general language was not inadvertent. One of the bills considered by Congress provided that when a member complained to the Secretary of a violation of

the Act, the Secretary was to investigate "such allegation," and bring an action only if he found "probable cause to believe that such allegation is true" S. 1002, 86th Cong., 1st Sess., 105 Cong. Rec. 2067. The Conference Committee adopted the broader view, reflected in the Senate Report, that the Secretary was "to investigate the complaint and determine whether there is probable cause to believe that an election was not held in conformity with the requirements of the bill." S. Rep. No. 187, 86th Cong., 1st Sess., p. 21.

Congress, moreover, provided a sixty-day period for the investigation of election complaints and gave the Secretary sweeping investigative powers, powers that would be unnecessary if the Secretary's responsibility were merely to verify the allegations of an individual member's protest. As this Court reasoned in *Wirtz* v. *Local Union No. 125, supra* (Slip op., pp. 5–6):

> First, it is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint which often must be based on incomplete information. The expertise and resources of the Labor Department were surely meant to have a broader play. Second, so to constrict the Secretary would be inconsistent with his vital role, which we emphasize today in *Wirtz* v. *Local 125, etc., ante;* in protecting the public interest bound up

> in Title IV. The Act was not designed merely to protect the right of a union member to run for a particular union office in a particular election. Title IV's special function in furthering the general goals of the LMRDA is to insure free and democratic union elections, the regulations of the union electoral process enacted in the Title having been regarded as necessary protections of the public interest as well as of the rights and interests of union members.
>
> We can only conclude, therefore, that it would be anomalous to limit the reach of the Secretary's cause of action by the specifics of the union member's complaint. * * * [Footnotes omitted.]

These considerations seem fully applicable here. Indeed, so long as the union has "had a fair opportunity to consider and resolve" the matter complained of (*Local Union No. 125, supra,* Slip op., p. 7), what difference can it make whether that occasion was the processing of the union member's protest or another time, prior to suit? No doubt, the labor reform law intends to afford unions an opportunity to put their own house in order before the government or the courts become involved. Accordingly, the Secretary cannot act without receiving some complaint from a member. But once his intervention is properly invoked, there is no reason to suppress additional violations turned up by his investigation. Otherwise there would be a premium upon union suppression of facts,

so that its members cannot learn of violations. It is enough if the union is given notice and a reasonable time to take corrective steps. To the extent that this was done here, we submit the district court committed error when it struck from the Secretary's complaint the three allegations in question.[10]

[10] At trial the Secretary tendered, and the district court rejected, proof that two of the three violations were brought to respondent's attention (A. 78–81, 283–287).

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded to the district court with directions to order a supervised election under the supervision of the Secretary. Alternatively, if the Court should hold that the prior office-holding rule was not illegal or that there was no showing that it "may have affected" the outcome, the case should be remanded with directions to hold a trial as to the three additional alleged violations.

Respectfully submitted.

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